

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

PATRICK WAYNE COLSTON,

Plaintiff,

v.

CASE NO. 19-3199-SAC

THE HERSHEY COMPANY, et al.,

Defendant.

MEMORANDUM AND ORDER

This matter is purported to be a civil rights action filed under 42 U.S.C. § 1983. Mr. Colston is a prisoner in the Cherokee County Jail in Columbus, Kansas, and he proceeds *pro se* and *in forma pauperis*. Plaintiff complains about an advertisement for Kit Kat candy bars, alleging it makes fun of disabled persons such as Plaintiff. Plaintiff seeks a broadcast apology, compensatory damages for his mental stress, and an amount based on Defendants' net worth to be donated to handicapped-based charities.

When a prisoner files a § 1983 action, a federal court must conduct an initial screening of the action. *See* 28 U.S.C. § 1915A(a). In conducting the screening, the court must identify any viable claim and must dismiss any part of the action that is frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks monetary damages from a defendant who is immune from such relief. *See* 28 U.S.C § 1915A(b).

Having reviewed the complaint filed by Mr. Colston, the Court finds this action is legally frivolous and should be summarily dismissed. To state a claim under § 1983, a plaintiff "must

show that the alleged (constitutional) deprivation was committed by a person acting under color of state law.” *West v. Atkins*, 487 U.S. 42, 48–49 (1988); *Daniels v. Williams*, 474 U.S. 327, 330–331 (1986); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155 (1978); *Northington v. Jackson*, 973 F.2d 1518, 1523 (10th Cir. 1992). The “under color of state law” requirement is a “jurisdictional requisite for a § 1983 action.” *West*, 487 U.S. at 42; *Polk County v. Dodson*, 454 U.S. 312 (1981). Thus, it is of no consequence how discriminatory or wrongful the actions a plaintiff may describe; merely private conduct does not satisfy the “under color of” element and therefore no § 1983 liability exists. See *Brentwood Academy v. Tennessee Secondary Athletic Ass’n*, 531 U.S. 288, 294–96 (2001); *American Manufs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999). A defendant acts “under color of state law” when he “exercise[s] power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.” *West*, 487 U.S. at 49; *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982); *Yanaki v. Iomed, Inc.*, 415 F.3d 1204, 1208 (10th Cir. 2005), *cert. denied*, 547 U.S. 1111 (2006).

Mr. Colston names two defendants, The Hershey Company USA and Societe des Produits Nestle S.A. Neither defendant is a state actor or acting under color of state law and consequently cannot be held liable under § 1983. The Court thus finds Plaintiff’s claims legally frivolous and subject to summary dismissal.

For this reason, Plaintiff’s complaint is dismissed.

IT IS THEREFORE ORDERED that this action is summarily dismissed as legally frivolous and for failure to state a claim.

IT IS FURTHER ORDERED that Plaintiff’s motion for partial initial filing fee adjustment (ECF No. 4) is denied as moot.

IT IS SO ORDERED.

DATED: This 25th day of October, 2019, at Topeka, Kansas.

s/ Sam A. Crow
SAM A. CROW
U.S. Senior District Judge